Supreme Court, U.S.
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No. 98-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. This petition raises the same question as that set forth in the pending petition for *certiorari* in *State Board of Equalization of the State of California v. Southern Pacific Transp. Co.*, No. 98-584, which is: Is section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"), 49 U.S.C. § 11501, appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment so as to abrogate the States' Eleventh Amendment immunity from suit in federal court? Petitioner requests that the Court consider the two petitions together.

LIST OF PARTIES

Petitioner is the State Board of Equalization of the State of California. Respondent is the Atchison, Topeka & Santa Fe Railway Company, a Delaware corporation with its principal place of business in Topeka, Kansas.

The following California Counties were defendants in the action below: Alameda, Contra Costa, Fresno, Kern, Kings, Los Angeles, Madera, Merced, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Joaquin, and Tulare.

Title 28 U.S.C. § 2403(a) may apply and this petition shall therefore be served on the Solicitor General of the United States.

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OPINION OR JUDGMENT BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit, filed November 13, 1998, is not reported and is reprinted in Appendix A. The orders and judgments of the United States District Court for the Northern District of California are not reported and are reprinted in Appendix B. The decision of the Court of Appeals for the Ninth Circuit in *Oregon Short Line Railroad Company v. Department of Revenue, Oregon* is reported at 139 F.3d 1259 (9th Cir. 1998), and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit, apparently basing its action upon its recent decision in *Oregon Short Line Railroad Company, supra*, entered its judgment summarily affirming the decision of the United States District Court for the Northern District

of California. The district court had held that, although defendant California State Board of Equalization was immune from suit in federal court pursuant to the Eleventh Amendment with regard to other consolidated railroad cases, plaintiff Atchison, Topeka & Santa Fe Railway Company (hereinafter "Santa Fe") was entitled to summary judgment and permanent injunctions. The motion for summary affirmation was made solely on the basis of *Oregon Short Line*. In *Oregon Short Line*, the Ninth Circuit held, *inter alia*, that, although this Court's Eleventh Amendment holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), applied retroactively to all cases which were not fully final, under the *Seminole Tribe* test the 4-R Act enforced the Equal Protection Clause so as to abrogate the States' Eleventh Amendment immunity from suit in federal court. This Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1). A decision denying Eleventh Amendment immunity is final for purposes of appeal. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

CONSTITUTIONS, STATUTES OR REGULATIONS

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall a State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 11501 of Title 49 of the U.S. Code provides in relevant part:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem tax on rail transportation at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation

> subject to the jurisdiction of the Board under this part.
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. ...

Section 1341 of Title 28, United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Pertinent portions of the following sections of the California Constitution and the California Revenue and Taxation Code are reprinted in Appendix D:

> Cal. Const., art. XIII, § 19;
>
> Cal. Rev. & Tax. Code §§ 721, 722, 731, 732, 733, 741, 742, 743, 744, 755, 756, 2601, 2601, 2603, 5148, and 5170

STATEMENT OF THE CASE

Section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act", 49 U.S.C. § 11501) prohibits States and their subdivisions from applying tax schemes that unreasonably burden and discriminate against interstate commerce. Since its enactment, railroads have routinely filed suits in federal courts throughout the country to challenge State tax assessments as violative of the 4-R Act. However, this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), called into question whether the 4-R Act's stated abrogation of the States' Eleventh Amendment immunity was constitutional.

The Court of Appeals for the Ninth Circuit resolved the question in this case by granting respondent Santa Fe's motion for summary affirmance. Santa Fe's motion was based on the Ninth Circuit's recent decision in *Oregon Short Line, supra,* which held that Congress enacted the 4-R Act pursuant to the enforcement provisions of the Fourteenth Amendment. The Ninth Circuit therefore affirmed the district court's judgments in this case granting Santa Fe's motions for summary judgments and permanent injunctions.

The Ninth Circuit's ruling is inconsistent with this Court's precedent controlling the determination of whether Congress passed an enactment to enforce the Equal Protection Clause of the Fourteenth Amendment. The California State Board of Equalization (the "Board") again seeks this Court's review because of the importance of this issue to States' sovereignty, and because of the frequency with which 4-R Act cases are filed in federal court.[1/]

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1. On this issue, the Court has pending before it another petition from the Board, and the State of Ohio filed a supporting *amicus* brief that 29 other States joined. *State Bd. of Equal., Calif. v. So. Pacific Transp. Co., et al.*, No. 98-584, filed October 5, 1998. In its *amicus*

A. State-Assessed Property.

The Board is responsible for the annual valuation and assessment of the property of railroads and public utilities. Cal. Const., art. XIII, § 19; Cal. Revenue & Taxation Code §§ 721, 722, 731, and 732. Pursuant to California Revenue and Taxation Code section 732, the Board is required to mail notice to the railroads of the assessed value of their nonunitary property and advise them of the date by which a declaration of their intent to file a petition for reassessment can be filed. If a declaration of intent or a petition for reassessment is not timely filed, then the Board's assessment becomes final at the expiration of the period specified in the Board's notice. Cal. Rev. & Tax. Code § 733. If a petition for reassessment is filed, the Board's assessment becomes final on the earlier of its decision upon the petition or December 31 of the assessment year at issue. Cal. Rev. & Tax. Code §§ 741-744.

The Counties are responsible for the collection of state-assessed property taxes. On or before July 15 of any assessment year, the Board must transmit to each

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brief, the State of Ohio explained that one of its reasons for supporting the petition is that the resolution of the issue of the scope of Congressional power under section 5 of the Fourteenth Amendment has been a recurring issue for the lower federal courts. With regard to whether the 4-R Act can be deemed a valid exercise of section 5 enforcement power, there has been a divergence of opinions. *Compare Oregon Short Line, Wheeling & Lake Erie Ry. v. Pub. Util. Comm'n*, 141 F.3d 88 (3rd Cir. 1998), and *Fox River Valley R.R. v. Dept. of Revenue*, 863 F.Supp. 893 (E.D. Wisc. 1994), *with Union Pacific R.R. v. State of Utah*, 996 F.Supp. 1358 (D. Utah 1997), and *Union Pacific R.R. v. Burton*, 949 F.Supp. 1546 (D. Wyo. 1996); *but see CSX Transp., Inc. v. Board of Pub. Works*, 138 F.3d 537 (4th Cir. 1998), *cert.den.* ---- U.S. ----, 119 S. Ct. 63 (1998)[Court need not determine in this case whether 4-R Act is remedial legislation to enforce Equal Protection clause of Fourteenth Amendment or substantive legislation that defines the Amendment's restrictions on the states].

County auditor an estimate of the total value of state-assessed property. Cal. Rev. & Tax. Code § 755. By July 31, the Board must transmit the assessment roll to County auditors. Cal. Rev. & Tax. Code § 756. The County auditors prepare tax calculations and transmit the rolls to the County tax collectors, and the County tax collectors collect the taxes. Cal. Rev. & Tax. Code §§ 2601, 2602 and 2603.

Railroads have a state court remedy for the refund of property taxes. Cal. Rev. & Tax. Code § 5148. Judicial review in these suits for refund is *de novo*. Cal. Rev. & Tax. Code § 5170.

B. **Proceedings Below.**

Santa Fe and other railroads are the plaintiffs in 4-R Act cases that have been consolidated under one master case number in the United States District Court for the Northern District of California since 1981. Plaintiffs in all these cases have asserted that the Board's classification, valuation, and assessment of certain railroad property violated the federal 4-R Act.

Following this Court's decision in *Seminole Tribe*, the Board filed a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss all of the remaining 4-R Act cases. Santa Fe and another plaintiff filed motions for summary judgment and to amend their complaints to include a separate cause of action against the defendant Counties, to add the individual Board Members as defendants pursuant to the doctrine of *Ex Parte Young*, and to allege that the 4-R Act was enacted pursuant to the Fourteenth Amendment as well as the Interstate Commerce Clause. At the time, Santa Fe's pending cases involved the Board's escape assessment for the 1991 tax year, and its assessment for the 1993 tax year, of nonunitary property subject to 4-R Act relief.

On October 28, 1997, the district court issued an order regarding all the parties' motions. Appendix B, pp. 1-25. With regard to the Board's motion to dismiss, the

court ruled that, in enacting the 4-R Act, Congress expressly intended to abrogate the states' Eleventh Amendment immunity, but its use of the Interstate Commerce Clause to abrogate that immunity was not a valid exercise of Congressional power. Appendix B, pp. 13-15, 19, 21, 24, and 25. However, despite its determination that it lacked subject matter jurisdiction and its dismissal of the other pending cases, the court granted Santa Fe's motions for summary judgment. Appendix B, pp. 24-25. The court found that it was bound by a final judgment on the merits that had previously been entered in favor of Santa Fe with respect to earlier tax years.

The district court entered its judgments in favor of Santa Fe (and in favor of the Board in the other pending cases) on February 3, 1998. Appendix, pp. 26 and 27. The court later denied the Board's motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the Santa Fe judgments. Appendix B, p. 28. The Board filed timely notices of appeal on June 15, 1998.

On March 23, 1998, the Ninth Circuit issued its opinion in *Oregon Short Line*, holding that the 4-R Act was appropriate legislation to enforce the Equal Protection Clause. Appendix C. Based on that decision, Santa Fe thereafter filed a motion for summary affirmance, relying upon Ninth Circuit Rule 3-6. The Ninth Circuit granted Santa Fe's motion on November 13, 1998, and entered judgment affirming the district court's judgments in favor of Santa Fe. Appendix A.[2/]

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2. The other railroad plaintiffs appealed from the district court's February 3rd judgments dismissing their 4-R Act suits. On July 6, 1998, the Ninth Circuit granted the motion of Southern Pacific Transportation Company for summary disposition, vacated the district court's judgments, and remanded for further proceedings consistent with the *Oregon Short Line* case.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND THREATENS LIMITLESS CONGRESSIONAL ABROGATION OF ELEVENTH AMENDMENT IMMUNITY.

Apparently relying on its recent ruling in *Oregon Short Line*, the Ninth Circuit granted a motion to summarily affirm the judgment of the district court, based on the proposition that the district court had subject matter jurisdiction to enter the judgments in favor of Santa Fe despite the Board's assertion of Eleventh Amendment immunity from suit. In *Oregon Short Line*, and impliedly in this case, the Ninth Circuit ruled that Congress properly abrogated the States' Eleventh Amendment immunity in the 4-R Act, because the Act is appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. The Ninth Circuit's decision is inconsistent with this Court's precedent prescribing the test for congressional abrogation of Eleventh Amendment immunity under the Fourteenth Amendment. It expands Congress' ability to abrogate the States' immunity to statutes that are not based on a valid exercise of power.[3]

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3. Santa Fe's motion for summary affirmance was based solely on the *Oregon Short Line* decision. In *Oregon Short Line*, the Ninth Circuit preliminarily ruled that the *Seminole Tribe* test was to be applied retroactively to the case pending before it. 139 F.3d at 1265. That part of the Ninth Circuit's ruling in *Oregon Short Line* is consistent with this Court's precedent that a rule of federal law, once

As this Court ruled in *Seminole Tribe*, an attempted congressional abrogation of States' Eleventh Amendment immunity cannot be upheld under the Commerce Clause. 517 U.S. at 71-74. Only the Fourteenth Amendment supports a federal statute's abrogation of immunity, provided that Congress acts "pursuant to a valid exercise of power" under section 5 of that amendment. 517 U.S. at 55. The 4-R Act was not enacted pursuant to a valid exercise of power under the Fourteenth Amendment.

The 4-R Act explicitly prohibits conduct by State and local authorities which "unreasonably burden[s] and discriminate[s] against interstate commerce...." 49 U.S.C. § 11501. As this Court and the Ninth Circuit, itself, have observed, the purpose of the 4-R Act was to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987); see *Trailer Train Co.*

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announced and applied to the parties to a controversy, is the controlling interpretation of federal law and must be given full retroactive effect in all non-final cases in all courts adjudicating federal law. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 96-97 (1993). However, the Ninth Circuit's retroactivity ruling in *Oregon Short Line* is contrary to the district court's granting of Santa Fe's summary judgment motions. Appendix B, pp. 24-25. The litigation of Santa Fe's 1991 escape assessment and 1993 assessment was still pending on March 27, 1996, when this Court issued the *Seminole Tribe* decision. Appendix B, pp. 4, 24-25. Thus, the Board assumes that the Ninth Circuit in the present case based its summary affirmation upon all the bases provided by the Ninth Circuit for its decision in *Oregon Short Line*. Should this Court ultimately reverse the Ninth Circuit, the Board submits that the reversal should be accompanied by a remand to the Ninth Circuit to direct the district court to dismiss this case on the basis of proper application of *Seminole Tribe*.

v. State Board of Equalization, 697 F.2d 860, 865 (9th Cir. 1983). The policy supporting the 4-R Act, memorialized at 49 U.S.C. § 10101, describes the commercial and economic objectives aimed at unburdening interstate commerce by strengthening the rail transport infrastructure of this country through competition and the free market. The only mention made of prohibiting discrimination is with respect to these economic goals, and with a specific reference to "interstate commerce".

In light of the prior holdings of this Court, the Board submits that Congress cannot validly invoke its enforcement powers under section 5 of the Fourteenth Amendment merely because the word "discrimination" appears within the statutory text. This Court has held that the enforcement power under section 5 is not unlimited. See *City of Boerne v. Flores*, 521 U.S. ----, ----, 117 S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1997). Statutes enacted pursuant to Congress' section 5 enforcement power must be remedial in nature and designed to prevent a constitutional infraction. *Id.* The 4-R Act is not a Congressional remedy for an equal protection violation.

Before the 4-R Act was enacted, this Court held that conventional discrimination between railroads and other classifications of property were not violations of the railroads' right to equal protection. See, e.g., *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 367-371 (1940).[4] Without evidence that Congress, in enacting the 4-R Act, was acting within its section 5 power to enforce the Fourteenth Amendment, the 4-R Act

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4. "That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate--these are among the commonplaces of taxation and of constitutional law." *Browning*, 310 U.S. at 368.

cannot constitute such enforcement under that amendment. *City of Boerne*, 521 U.S. ----, ----, 117 S.Ct. at 2168-2169.

The 4-R Act does not contain a congressional expression that the Act was passed "to secure the rights under the Fourteenth Amendment." Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). Rather, the 4-R Act states that certain "acts unreasonably burden and discriminate against interstate commerce" and therefore violate the statute.

Prior to the passage of the 4-R Act, disparate classifications concerning railroads for taxation purposes did not violate the Equal Protection Clause. See *Browning*, 310 U.S. at 369 ("so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another ..."). Nevertheless, the Ninth Circuit characterizes such classifications as unconstitutional and sufficient to warrant congressional enactment of the 4-R Act under the Fourteenth Amendment Equal Protection Clause. *Oregon Short Line*, 139 F.3d at 1267. However, the two cases on which the Ninth Circuit relies, *Southern Railway Company v. Green*, 216 U.S. 400 (1909), and *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336 (1988), do not support its decision. Rather, these cases struck down certain egregious State tax practices because those practices rose to the level of constitutional violations of the Equal Protection Clause.

Southern Railway involved the State of Alabama's imposition of a new, additional, and special tax on foreign corporations that was not imposed on domestic corporations conducting the same type of railroad business. 216 U.S. at 412, 416-418. This Court held that the challenged tax was an arbitrary selection that could not be justified by calling it a classification. 216 U.S. at 417. Similarly, in *Allegheny Pittsburgh Coal*, this Court found that over a period of 10 years, the Webster County

tax collector engaged in intentional and systematic undervaluation of neighboring coal fields comparable to that of the petitioners, while the petitioners' property was valued at from 8 to 35 times more. 488 U.S. at 344-346. The Court found that this undervaluation of comparable property denied petitioners equal protection of the laws. 488 U.S. at 346.

Unlike the taxes imposed in *Southern Railway* and *Allegheny Pittsburgh Coal*, the acts that unreasonably burden and discriminate against interstate commerce, as determined in the 4-R Act, may not be so arbitrary or egregious as to rise to the level of a constitutional violation under the Equal Protection Clause. As this Court stated in the *City of Boerne* case:

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce", not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." 521 U.S. at ----, 117 S.Ct. at 2164.

Congress cannot make constitutional classifications unconstitutional, even if it can make such classifications unlawful. *City of Boerne*, 521 U.S. ----, 117 S.Ct. at 2163-2164. The 4-R Act prohibited long-standing, constitutionally permissible discriminatory taxation practices. While Congress has such powers under the Commerce Clause, it could not make such discrimination unconstitutional under the Equal Protection Clause. Moreover, it should not be inferred, solely for the purpose of circumventing the States' Eleventh Amendment immunity, that the Act is legislation to enforce the Equal Protection Clause. See *Quern v. Jordan*, 440 U.S. 332, 342-345 (1979). When Congress has not expressly articulated its intent to legislate pursuant to the

Fourteenth Amendment, courts should not "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State School v. Halderman*, 451 U.S. 1, 15-16 (1981).

The Ninth Circuit's permissive test for implicit abrogation of Eleventh Amendment immunity creates a grave danger of limitless congressional and judicial overrides of the States' immunity from suit in federal court. Under the Ninth Circuit's reasoning in *Oregon Short Line*, 139 F.3d at 1266, a federal court is free to find that Congress abrogated Eleventh Amendment immunity under the Fourteenth Amendment by enacting a statute that prohibits conduct which is not itself unconstitutional, so long as the court determines that the effect of the statute can be expected, under at least some circumstances, to result in enforcement of a Fourteenth Amendment guarantee. Significantly, the Ninth Circuit found it unnecessary in *Oregon Short Line* to determine whether the railroad had been deprived of any Fourteenth Amendment guarantees.

Without a constitutional infraction of the Fourteenth Amendment, there is no issue to address concerning whether the section 5 enforcement power can be employed to abrogate the States' Eleventh Amendment immunity. Thus, in the 4-R Act, Congress could not have been acting to redress a Fourteenth Amendment injury, for no Fourteenth Amendment injury existed. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at ----, 117 S.Ct. at 2164. Accordingly, after this Court's decision in *Seminole Tribe*, and in the absence of any other legitimate constitutional grant of power, the congressional intent to abrogate the States' immunity under the 4-R Act cannot be upheld as enacted pursuant to a valid exercise of power. The Ninth Circuit's test for validity under section

5 of the Fourteenth Amendment, employed in *Oregon Short Line* and in the present case, is so permissive, "it is difficult to conceive of a principle that would limit congressional power." *City of Boerne*, 521 U.S. at ----, 117 S.Ct. at 2168. This Court should grant the petition to curtail the Ninth Circuit's permissive test for congressional abrogation under the Fourteenth Amendment.

CONCLUSION

In *Seminole Tribe* this Court ruled that the Fourteenth Amendment is the sole source of Congressional power to abrogate unilaterally the States' Eleventh Amendment immunity from suit in federal courts. *Seminole Tribe* teaches that the Commerce Clause does not grant Congress the power to abrogate Eleventh Amendment immunity, and makes clear that Congress' power to abrogate is limited.

The Ninth Circuit's decision radically expands congressional abrogation authority. Under the Ninth Circuit's reasoning, a federal statute, such as the 4-R Act, intended to ameliorate Commerce Clause concerns, can be linked to the Fourteenth Amendment simply by a congressional reference to the word "discrimination", even if the discrimination does not violate Equal Protection guarantees. The Ninth Circuit's reasoning emasculates the essential teaching of *Seminole Tribe*. The petition should be considered with the pending petition in *State Board of Equalization of the State of California v. Southern Pacific Transportation Company, et al.*, No. 98-584, and both should be granted to ensure the vitality of that important decision and to curtail further encroachment into States' Eleventh Amendment immunity.[5]

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5. This Court's recent grants of four petitions for writs of *certiorari* indicate the importance of resolving the question of the scope of Congressional power to abrogate States' Eleventh Amendment immunity by enacting statutes pursuant to Article I powers. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 131 F.3d 353 (3rd Cir. 1997)[Trademark Remedy Clarification Act, Pub.L. No. 102-542, 102 Stat. 3567 (1992) amending Lanham Act (U.S. Supreme Court Docket No. 98-149)]; *Kimel v. State of Florida, Board of Regents*, 139 F.3d 1426 (11th Cir. 1998)[Age Discrimination In Employment Act, 29 U.S.C. §§ 621 *et*

Dated: February 10, 1999.

Respectfully submitted,

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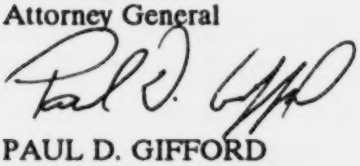

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seq. (U.S. Supreme Court Docket Nos. 98-791 and 98-796)]; *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 148 F.3d 1343 (Fed. Cir 1998)[Patent & Plant Variety Protection Remedy Clarification Act, Pub.L. No. 102-560, 102 Stat. 4230 (1992) amending Patent Act (U.S. Supreme Court Docket No. 98-531)]. Because the taxation authority is a traditional state power that is recognized as central to sovereignty, *Department of Revenue, Oregon v. ACF Industries, et al.*, 510 U.S. 332, 344-345 (1994); see also, *Arkansas v. Farm Credit Services of Cent. Arkansas*, 520 U.S. 821, 117 S.Ct. 1776, 1780 (1997), and cases cited therein ["The power to tax is basic to the power of the State to exist"], the Board submits that it is at least equally important to resolve this question with regard to the 4-R Act.

MCS